

STATE OF MINNESOTA  
OFFICE OF ADMINISTRATIVE HEARINGS  
FOR THE DEPARTMENT OF NATURAL RESOURCES

In the Matter of Minnesota Department of  
Natural Resources Special Permit No.  
16868 (December 12, 2012) Issued to  
Lynn Rogers

**ORDER REGARDING MOTION  
TO SUPPLEMENT THE RECORD**

This matter was heard by Chief Administrative Law Judge Tammy L. Pust from February 24, 2014 through March 6, 2014. After receipt of post-hearing submissions, the record closed on April 2, 2014

David R. Marshall, Leah C. Janus and Jessica L. Edwards, Fredrikson & Byron, P.A., appeared on behalf of Dr. Lynn Rogers (Dr. Rogers).

David P. Iverson and Linda S. Jensen, Assistant Attorneys General, appeared on behalf of the Department of Natural Resources (Department or DNR).

On April 4, 2014, Dr. Rogers brought a Motion to Compel Recently Discovered Documents Withheld by the DNR. The Department filed a response to the motion on April 11, 2014.

On April 13, 2014, the Chief Administrative Law Judge issued an Order Regarding Motion to Compel requiring the Department to provide certain identified data for *in camera* inspection. On April 15, 2014, the Department provided documentation in response to the Order.

On April 17, 2014, the Chief Administrative Law Judge issued a Second Order Regarding Motion to Compel, in which the Judge: (1) granted the motion to compel with respect to certain identified documents; and (2) imposed monetary sanction upon the Department for its failure to comply with the rules of discovery.

On April 23, 2014, Dr. Rogers brought the current Motion to Supplement the Record, seeking to introduce certain documents into the hearing record in the matter. The Department filed its response to the motion on April 29, 2014.

Based upon the evidence and argument submitted by the parties, and the files and proceedings herein, the Chief Administrative Law Judge makes the following:

## ORDER

1. The Motion to Supplement the Record is DENIED for the reasons stated in the attached Memorandum.

2. The record is reopened for a period of four (4) days and will be again closed at 4:30 p.m. on May 2, 2014.<sup>1</sup>

3. By 4:30 p.m. on May 1, 2014, the parties may file an Amended Memorandum of Law and Amended Proposed Findings of Fact, Conclusions of Law and Recommended Order, but only with respect to any arguments and/or amendments related to the issues raised by or facts included in the 28 pages of documents produced pursuant to the Second Order Regarding Motion to Compel dated April 18, 2014. Any filed submissions shall be accompanied by copies of any of the 28 late-produced documents upon which the submissions rely, together with a Motion to Supplement the Record with respect to those documents, which will be deemed granted upon submission.

4. By 4:30 p.m. on May 2, 2014, the parties may file responses to any submissions filed pursuant to this Order.

5. Pursuant to Minn. R. 1400.8401, subp. 7, within thirty (30) days of the May 2, 2014 record close date, the Chief Administrative Law Judge will issue her Findings of Fact, Conclusions of Law and Recommended Order.

Dated: April 29, 2014

s/Tammy L. Pust  
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TAMMY L. PUST  
Chief Administrative Law Judge

## MEMORANDUM

As set forth in the memorandum attached to the Chief Administrative Law Judge's Second Order Regarding Motion to Compel Production, the Department failed to comply with the rules of discovery when it did not provide to Dr. Rogers approximately 28 pages made up of e-mail communications and parts of a draft paper, all of which were authored or compiled by Dr. David Garshelis. Dr. Rogers now seeks to introduce into the hearing record three e-mail exchanges between Dr. Garshelis and Dr. Steven Stringham, with copies to others, all dated March 24, 2014. Dr. Rogers argues that the documents should be added to the hearing record for the following reasons: (1) to buttress his claim that Dr. Garshelis intentionally excluded him from participating in a peer-reviewed paper related to a 2011 conference presentation; (2)

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<sup>1</sup> Pursuant to Minn. R. 1400.7800, subp. J.

they are relevant to the weight and credibility properly given to the hearing testimony of Dr. Garshelis; and (3) the evidence is relevant to a claim of bias.<sup>2</sup>

The motion fails for several reasons, the most obvious of which is that none of the three e-mails were included in the 28 pages of late-produced documentation. Their production did not result from any discovery violation on the part of the Department, and there has been no showing that Dr. Rogers otherwise has any lawful basis to seek to submit them into the record at this point in the proceedings. The hearing in this matter ended on March 6, 2014; these e-mails were not authored until March 24, 2014. Clearly, the Department had no obligation to produce these documents as supplemental to its earlier discovery responses, as they did not exist at the time the hearing testimony was complete. While the e-mails consist of a contentious difference of opinion between Dr. Stringham and Dr. Garshelis regarding issues related to authorship of a paper and their differing degrees of respect for Dr. Rogers, this electronic discussion took place some 11 months after the Department made its decision not to renew Dr. Roger's special permit. As such, its relevance to the Department's decision-making in the operative timeframe is marginal, at best.

In recognition of the fact that the 28 pages of late-produced documents may contain information relevant to this matter which would have been available for submission into the record at hearing if timely produced, this Order allows the parties to amend their post-hearing submissions for the purpose of citing to those documents or any information they contain. The record is reopened for that limited purpose, and will close on May 2, 2014.

**T. L. P.**

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<sup>2</sup> Dr. Rogers' Motion to Supplement the Record, at unnumbered page 3.